

REMARKS/ARGUMENTS

Favorable reconsideration of this application in view of the above amendments and following remarks is respectfully requested.

Claims 22, 24-25 and 27-42 are pending in this application. Claims 33-38 are withdrawn from consideration. By this amendment, Claims 22 and 24 are amended; Claim 26 is cancelled; and no claims are added herewith. It is respectfully submitted that no new matter is added by this amendment.

In the outstanding Office Action, Claims 24 and 26 were rejected under 35 U.S.C § 112, second paragraph; Claims 22, 24-28, 31-32 and 39-42 were rejected under 35 U.S.C § 103(a) as unpatentable over U.S. Patent No. 6, 389,711 to Polegato in view of U.S. Patent No 5,022,168 to Jeppson; Claims 29 and 30 were rejected under 35 U.S.C § 103(a) as unpatentable over Polegato and Jeppson and further in view of U.S. Patent No. 4,446,633 to Scheinhaus.

Regarding the previous election of species requirement, Applicant appreciates the Examiner acknowledging in the telephone conversation in October 2008 that the indication of "without traverse" in the present Office Action was in error. The election of species requirement was timely traversed in the Amendment filed July 14, 2008. Further, with respect to the election of species requirement, Claim 22 is amended by the present amendment and reads on the embodiments shown in all of Figures 1-9, in which the vapor-permeable comfort layer made of a three-dimensional fabric and forming a ventilation gap is included in the upper element of the sole for shoes. Thus, it is respectfully requested that withdrawn Claims 33-38 be considered by the Examiner.

With respect to the rejection under 35 U.S.C 112, second paragraph, independent claim 22 is amended to recite in part that the second layer is constituted by a least one vapor-

permeable comfort layer. Claim 26 is cancelled by the present amendment. Accordingly, withdrawal of the rejection under 35 U.S.C 112, second paragraph is respectfully requested.

Turning now to the merits, in order to expedite issuance of a patent in this case, Applicant has amended the independent claim to clarify patentable distinctions of the present invention over the cited references. Specifically, Applicant has amended Claim 22 to recite a lower element, an upper element that includes a first layer made of vapor-permeable and/or perforated material, a second layer that is constituted by at least one vapor-permeable comfort layer arranged below said first layer and made of a three-dimensional fabric and forming a ventilation gap, and a third layer arranged below said vapor-permeable comfort layer, and a vapor-permeable and waterproof membrane interposed between the lower and upper elements.

In contrast, Polegato discusses with respect to Fig. 1, an outsole 13, a pre-molded insert 14 that includes a waterproof and vapor permeable membrane 15 and an insole 17. The insert 14 with membrane 15 is arranged below the insole 17 and above the outsole 13.

Jeppson discusses an insert 2 that is inserted in a cavity 56 of an outsole 56 and then an insole 58 is placed there above. Please see Figs. 3-4 and the discussion in col. 3, lines 1-5, and col. 6, lines 23-45 of Jeppson. Accordingly, there is no teaching or suggestion for the features of the claimed invention discussed above. That is, there is no teaching or suggestion in Jeppson and/or Polegato, or in any of the other prior art references of record, to provide an upper element as claimed in combination with the other features of the independent claim 22.

Further, Applicant submits that one of ordinary skill in the art would not arrive at the claimed invention from a combination of the applied art. For example, any fair combination of Jeppson and Polegato would lead a person having ordinary skill in the art to place the insert 2 of Jeppson into the outsole 13 of Polegato, below the insole 17 of Polegato, in the manner as specifically taught by Jeppson. Such a combination would not result in the

claimed invention. Again, Claim 22 recites that the upper element include: a first layer for contact with the sole of the foot that fits said sole and that is made of vapor-permeable and/or perforated material; a second layer that is constituted by at least one vapor-permeable comfort layer arranged below said first layer and made of a three-dimensional fabric and forming a ventilation gap; and a third layer arranged below said vapor-permeable comfort layer. These features are not taught by the applied art either alone or in combination.

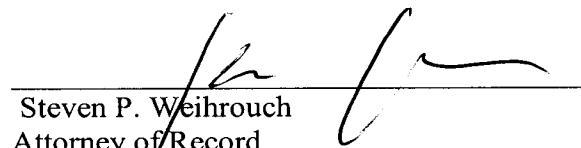
In accordance with the features of the claimed invention, the three-dimensional fabric layers forming the ventilation gap in the upper element, advantageously provides an excellent breath-ability of the foot combined with extreme comfort for the user, because such upper element with the comfort layer is provided in the upper element for direct contact with the user's foot. The particular claimed structure for providing these combined advantageous results is neither shown nor fairly suggested to a person having ordinary skill in the art anywhere in the prior art of record.

Consequently, for the reasons discussed in detail above, no further issues are believed to be outstanding in the present application, and the present application is believed to be in condition for formal allowance. Therefore, a Notice of Allowance is earnestly solicited.

Should the Examiner deem that any further action is necessary to place this application in even better form for allowance, the Examiner is encouraged to contact the undersigned representative at the below listed telephone number.

Respectfully submitted,

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